of the will, not even the part that preceded the signature, would be admitted to probate, though the part subsequent to the signature were abandoned.[5] The obvious reason is that the whole was a unit. On the other hand, reference to an extraneous document does not make it literally a part of the writing that refers to it, even though it be physically annexed, for it is only by a fiction that it is incorporated into the attested writing. In such a case the signature at the end of the will proper is a sufficient compliance with the statute; and this would seem to be true where the extraneous document is physically annexed after the signature as well as where it is physically separated. If the extraneous document is rejected because, for instance, the reference is too uncertain, the will itself will properly be admitted to probate.[6] A recent decision of the Appellate Division of the Supreme Court of New York, however, rejected the whole doctrine of incorporation by reference, citing the above-mentioned cases as authorities, and failing to draw the distinction suggested. *In re Emmons' Will*, 96 N. Y. Supp. 506. This decision, then, must be considered an arbitrary repudiation of the English rule, previously accepted in New York[7] as well as in many other jurisdictions in this country,[8] and apparently rejected in none, though questioned in Connecticut.[9] It is to be remarked, however, that the present case is supported by an unnoticed New York decision,[10] to which there was no allusion in subsequent decisions, containing *dicta* accepting the doctrine of incorporation by reference.[11]

THE RELATION BETWEEN BROKER AND PRINCIPAL IN MARGIN TRANSACTIONS. — It is customary for a broker purchasing stock on margin for a client by advancing upon interest the money required for the purchase in addition to the margin deposited, to have the shares registered in his own name, and, without attempting to keep separate the identical certificates purchased upon a particular client's order, to pledge them for his own debts.[1] Although these customs are well established, the American decisions interpreting them are not harmonious. Most courts, following New York decisions, describe the relation between principal and broker as that of pledgor and pledgee. The broker, it is held, acts properly in taking title to the stock in his own name.[2] Moreover, as shares of stock are fungible, he need not keep separate or retain those purchased for a particular customer; but he must keep under his control sufficient shares of a like kind

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[5] Matter of Hewitt, 91 N. Y. 261. But the strictness of this rule has been relaxed in cases where the part subsequent to the signature is held immaterial. Baker *v.* Baker, 51 Oh. St. 217.

[6] Wood *v.* Sawyer, 61 N. C. 251.

[7] Tonnele *v.* Hall, 4 N. Y. 140; *cf.* Jackson *v.* Babcock, 12 Johns. (N. Y.) 389, 394.

[8] Skinner *v.* American Bible Society, 92 Wis. 209; Newton *v.* Seaman's Friend Society, 130 Mass. 91; Fickle *v.* Snepp, 97 Ind. 289; Gerrish *v.* Gerrish, 8 Ore. 351; Pollock *v.* Glassell, 2 Gratt. (Va.) 439, 468; Harvy *v.* Chouteau, 14 Mo. 587; Beall *v.* Cunningham, 3 B. Mon. (Ky.) 390. But *cf.* Sharp *v.* Wallace, 83 Ky. 584. See also Johnson *v.* Clarkson, 3 Rich. Eq. (S. C.) 305; Hunt *v.* Evans, 134 Ill. 496.

[9] Phelps *v.* Robbins, 40 Conn. 250, 271; Bryan's Appeal, 77 Conn. 240.

[10] Booth *v.* Baptist Church, 126 N. Y. 215, 247.

[11] See Vogel *v.* Lehritter, 139 N. Y. 223.

[1] 1 Dos Passos, Stock-brokers and Stock-exchanges, 187, 251; Markham *v.* Jaudon, 41 N. Y. 235, 239.

[2] Horton *v.* Morgan, 19 N. Y. 170.

to be able to make delivery at any time to all customers without being obliged to purchase in the market.[3] Accordingly, it has recently been held that if he sells stock purchased for a customer without retaining other stock of a like kind and amount, he is guilty of conversion. *Content* v. *Banner*, 34 N. Y. L. J. 1899 (N. Y., Ct. App., Feb., 1906).[4]

Has the broker a right to repledge? At common law a pledgee has, apart from special agreement, no such right. Such an agreement, however, the courts generally imply in these cases by virtue of the general custom of repledging.[5] But the broker is liable in conversion if he pledges for an amount greater than the customer's indebtedness.[6] Dividends or assessments, though in the first instance received or paid by the broker as the record owner, are to be credited or charged to the client.[7]

The Massachusetts court, interpreting apparently identical customs, holds that the broker merely contracts to deliver stock to the customer in the future. The broker's duties under this view have not, however, been satisfactorily worked out. Obviously, though, unless restrained by special contract, he may pledge *ad libitum* stock purchased upon a customer's order.[8] It is said that the broker's contract requires him to purchase the stock and to procure delivery.[9] His contract, if it does not require such delivery, is illegal.[10] It has been added, however, that though he must procure delivery, he need not retain under his control sufficient stock for all customers.[11] But it would seem that the customer contracts for a right to have stock actually held by the broker, and intends not to rely upon the financial ability of the broker to purchase it; for otherwise the contract would permit the broker to speculate at his client's expense. Even, however, if this be conceded, important practical differences would still exist beween the New York and Massachusetts rules. Under the former rule the customer, upon a wrongful sale, can recover the value of the stock in conversion,[12] or affirm the sale and recover the proceeds;[13] under the latter rule his recovery is for breach of contract. Under only the former does the customer, if the broker becomes insolvent, possess rights higher than those of a general creditor.[14]

The facts that the customer pays interest, bears the burden of assessments, and receives the benefit of dividends, and incurs the liability for depreciation, seem clearly to show an intention not to create merely a contract right to future delivery, but to vest in him the beneficial ownership of the stock, subject only to a security title in the broker. As the title to the stock is in the broker, it is more accurate to describe the transaction as a chattel mortgage than as a pledge. So to hold does not conflict with the conclusions reached by courts which regard the contract as one of pledge. The

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[3] See Douglas *v.* Carpenter, 17 N. Y. App. Div. 329, 335.
[4] Stenton *v.* Jerome, 54 N. Y. 480; Gillett *v.* Whiting, 120 N. Y. 402.
[5] Skiff *v.* Stoddard, 63 Conn. 198, 219.
[6] Douglas *v.* Carpenter, *supra*.
[7] See Chase *v.* Boston, 180 Mass. 458, 460.
[8] See Rice *v.* Winslow, 180 Mass. 500, 503; Wood *v.* Hayes, 81 Mass. 375.
[9] See Chase *v.* Boston, *supra*; Covell *v.* Loud, 135 Mass. 41, 43.
[10] See Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251; Rice *v.* Winslow, *supra*.
[11] See *In re* Swift, 105 Fed. Rep. 493, 498; *cf.* Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120, 140.
[12] Baker *v.* Drake, 53 N. Y. 211; 66 N. Y. 518.
[13] See Taussig *v.* Hart, 58 N. Y. 425, 429.
[14] Skiff *v.* Stoddard, *supra*, at 224 *et seq.*

doctrine of fungible goods seems equally applicable to the relations of mortgage and pledge. If a mortgagee wrongfully disposes of chattels before or after tender of the amount due, the mortgagor may recover in conversion.[15]

MEASURE OF DAMAGES IN CONTRACTUAL ACTIONS. — In the leading case of Hadley *v.* Baxendale, decided in 1854, the rule was laid down that the damages recoverable in the ordinary action of contract are "such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach of it."[1] Few cases since have failed to apply the test thus formulated. But of a second proposition stated as a corollary in that case there has been no such unanimous approval. That proposition makes the defendant liable for damages naturally resulting from special circumstances where he had notice of such circumstances. High authorities have contended that mere notice to the defendant is not sufficient, that he must in effect agree to be responsible for the consequences of default under the special circumstances.[2] It is conceded, however, that in most cases the mere agreement to perform made by one having notice would be sufficient evidence to warrant a jury in finding that the defendant had in fact assumed the greater degree of liability.[3] The logical consequence of this view is an argument that carriers, who by law are deprived of the option of refusing performance, cannot be held for damages arising under special circumstances, even though they may have notice thereof.[4] The Supreme Court of Massachusetts in February declined to commit itself upon this question, contenting itself with a reference to an earlier opinion[5] in which the point was suggested but not determined. *Weston* v. *Boston and Maine R. R. Co.*, 34 Banker and Tradesman 541.

The rule making the fact of notice merely evidence of consent to stand by the consequences rests upon a misconception of the nature of the obligation to pay damages, a misconception somewhat aided by the language quoted above from Hadley *v.* Baxendale. The theory is that the obligation arises from the intention of the parties, and that the test suggested is one which the law adopts as most likely to ascertain and effectuate that intention in the given instance.[6] In fact, liability for damages is imposed by law, and is in no way consensual.[7] How, indeed, could it be when ordinarily

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[15] Eslow *v.* Mitchell, 26 Mich. 500; Pierce *v.* Hasbrouck, 49 Ill. 23.

[1] *Per* Alderson, B., in Hadley *v.* Baxendale, 9 Exch. Rep. 341, 354.

[2] Willes, J., in Horne *v.* Midland Railway Co., L. R. 7 C. P. 583, 591; Beal, Bailments, 663, 664; Benjamin, Sales, 6th Am. ed., 880; 2 Smith Lead. Cas., 11th Eng. ed., 541.

[3] Mayne, Damages, 7th ed., 42.

[4] Kelly, C. B., in Horne *v.* Midland Railway Co., L. R. 8 C. P. 131, 136, 137; Mayne, Damages, 7th ed., 32, 42; Carver, Carriage of Goods by Sea, 4th ed., § 716.

[5] Lonergan *v.* Waldo, 179 Mass. 135, 140.

[6] See Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540, 544, *per* Holmes, J.; Lonergan *v.* Waldo, *supra*, at 139, 140. *Cf.* Industrial Works *v.* Mitchell, 114 Mich. 29.

[7] See Cotton, L. J., in Hydraulic Engineering Co. *v.* McHaffie, L. R. 4 Q. B. D. 670, 677; Pollock, Notes to Indian Contract Act 260; 1 Sutherland, Damages, 3rd ed., 168; and especially an able article on "The Rule in Hadley *v.* Baxendale," by F. E. Smith, 16 L. Quar. Rev. 275.